Supreme Court U.S.
FILED
OCT 14 1997
CLERK

No. 97-450

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANE D. HILL, - - - - - - - - - *Petitioner,*

versus

J.J.B. HILLIARD, W.L. LYONS, INC., Et Al., - - - - - - - - - *Respondents.*

On Petition for Writ of Certiorari
To the Kentucky Court of Appeals

RESPONDENT BRAB'S BRIEF IN OPPOSITION

ELEANORE M. GARBER
First Trust Centre, 600N
200 S. Fifth Street
Louisville, Kentucky 40202
(502) 585-5100
Counsel for Respondent,
W. William Brab

October 14, 1997

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3351, LOUISVILLE, KY.

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
The question presented is highly misleading, biased and fails to state a clear federal issue	2
REASONS FOR DENYING THE WRIT	3
A. This Court is not the proper forum to promulgate a new national policy rejecting all mandatory arbitration	3
B. The issue of "knowing and voluntary" waiver of a judicial forum was never raised in the Kentucky courts	5
C. This Petition presents no unsettled Question of Federal Law	7
CONCLUSION	7

TABLE OF AUTHORITIES

	PAGE
Cases:	
Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 13 (1985)	4
Gilmer v. *Interstate/Johnson Lane Corp.* 500 U.S. 20 (1991)	4,5,7
Hill v. *California*, 401 U.S. 797 (1971)	6
In re Lamkin, 355 U.S. 59 (1957)	6
Keene Corp. v. *United States*, 508 U.S. 200 (1993)	5
McGoldrick v. *Compagnie Generale*, 309 U.S. 430 (1940)	6
Perry v. *Thomas*, 482 U.S. 480 (1987)	4,6
Prudential Insurance Co. v. *Lai* 42 F.3d 1299 (12th Cir., 1994) cert. denied, 116 S.Ct. 61 (1995)	6
Regional Jail Authority v. *Tackett*, Ky., 770 S.W. 2d 225 (1989)	6
Scherk v. *Alberto-Culver Co.*, 417 U.S. 506 (1974)	4
Smoot's Case, 15 Wall 36 (1873)	5
Southland Corp. v. *Keating* 465 U.S. 1 (1984)	4
Transportation Cabinet v. *Cassity*, Ky., 912 S.W. 2d 48 (1995, Amended, 1996)	6
Williams v. *Georgia*, 349 U.S. 75 (1955)	6
Statutes Cited:	
Federal Arbitration Act (FAA), 9 U.S.C. sec. 1 *et seq.*	3,4,5
28 U.S.C. sec. 1257	6
28 U.S.C. sec. 1500	5
Age Discrimination in Employment Act (ADEA) 29 U.S.C. sec. 621	4

No. 97-450

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANE D. HILL, - - - - - - - - - - *Petitioner,*

v.

J.J.B. HILLIARD, W.L. LYONS, INC., Et Al., - *Respondents.*

On Petition For Writ Of Certiorari To The Kentucky Court Of Appeals

---

RESPONDENT BRAB'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This petition is one of two petitions seeking this Court's review of a decision of the Kentucky Court of Appeals. The Kentucky trial court below dismissed claims of Jane Hill, petitioner, ("Hill", hereinafter) of assault and battery and intentional infliction of emotional distress along with Kentucky statutory claims of discrimination in employment against all respondents, including W. William Brab, her supervisor ("Brab" hereinafter). That court determined that **all** claims arose out of Hill's employment and were subject to mandatory arbitration pursuant to the Federal Arbitration Act. The Court of Appeals vacated the trial court order as to dismissal of the claims of assault and battery and false imprisonment against Brab and remanded same

for trial, but affirmed the remainder of the trial court's order.

In a separate petition (No. 96-459), Brab seeks review of a portion of the Court of Appeals decision in view of conflicting state and federal court decisions determining which types of claims against a supervisor should be subject to mandatory arbitration. In this petition, Hill objects to the policy of mandatory arbitration in general and contests the conclusion of the Kentucky Court of Appeals that all of Hill's claims against the employer and most of the claims against her supervisor arose out of her employment.

As set forth below, there is no cause for this Court's review of Hill's contentions. The question presented is misleading, biased and fails to state a clear federal issue. Furthermore, this Court is not the proper forum to promulgate a new national policy rejecting all mandatory arbitration. Additionally, the issue of "knowing and voluntary" waiver of a judicial forum, obliquely smuggled into this petition, was **never** raised in the Kentucky trial or appellate courts. Finally, the lower federal courts and states' highest courts have enforced, with virtual unanimity, mandatory arbitration agreements in the context of statutory civil rights claims of discrimination in employment.

The question presented is highly misleading, biased and raises no clear federal issue.

Petitioner has presented a highly misleading and loaded question. No citizen of the state of Kentucky or of the United States who claims to have been raped waives a judicial forum by reporting the allegation to an employer. Rape is a serious crime. Hill had unrestricted access to the criminal justice system and a right to a jury trial and chose not to avail herself of same.

The question as presented suggests that Hill is a proven victim and that Brab has been found criminally or civilly culpable of rape. There has been not been one scintilla of evidence presented in any forum supporting any of Hill's allegations, just as no evidence has been adduced to date supporting Brab's allegation of slander *per se*.

Hill's question as framed fails to notify this Court of any specific federal statute, rule or regulation underpinning a clear federal issue requiring this Court's attention.

REASONS FOR DENYING THE WRIT

A. This Court is not the proper forum to promulgate a new national policy rejecting all mandatory arbitration.

Respondent Brab submits that this case **does** present an important issue concerning the application of the Federal Arbitration Act (FAA), 9 U.S.C. sec. 1 *et seq.*, to claims brought against a supervisor during the course of an employment relationship. This Court is not the proper forum, however, to address the apparent issue discussed in **this** petition.

Hill's main thrust herein appears to be a frontal assault on sections 2, 3, and probably section 4 of the FAA which provide for the enforcement, through the state and federal courts, of mandatory arbitration agreements within the coverage of the Act. Hill does not suggest or imply that the FAA is unconstitutional on its face or in its applicability to this case. Instead, she alludes to "a vigorous and growing rejection of mandatory arbitration" **as a policy** by such organizations as the National Association of Security Dealers (NASD), the Equal Employment Opportunity Commission (EEOC), the National Academy of Arbitrators and others (Petition, pp. 5-7). Hill argues, rhetorically, that voluntary, post-dispute arbitration is "probably faster and cheaper" than mandatory arbitration and lacks the procedural disadvantages to employees versus employers (Peti-

tion, pp. 8-10.) It is difficult to ascertain from the petition exactly what adjudicatory function she asks this Court to perform in furthering the purported growing consensus against all mandatory arbitration.

The FAA was enacted by Congress in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code. This Court stated in *Perry* v. *Thomas,* 482 U.S. 483,489-490, (1987) as follows:

> As we stated in *[Southland Corp.* v.*] Keating,* [465 U.S. 1, 10, 16 (1984)] "in enacting sec. 2 of the [FAA] Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judi- cial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. [cites omitted]. Section 2, therefore, **embodies a clear federal policy of requiring arbitration** unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable "upon such grounds as exist at law or in equity for the revocation of any contract."
>
> (Emphasis added).

In *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20 (1991) this Court held that the FAA compels enforcement of arbitration clauses in a securities registration agreement involving a claim of discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. sec. 621. In that decision, this Court noted that the purpose of the enaction of the FAA was "to reverse the long-standing judicial hostility to arbitration agreements that had existed at common law and had been adopted by the American courts . . .", Id at 1651, citing *Dean Witter Reynolds Inc.* v. *Byrd,* 470 U.S. 213, 219-220 (1985) and *Scherk* v. *Alberto-Culver Co.,* 417 U.S. 506, 510 n.4 (1974). This Court has explcitly recognized the prerogative of Congress

to determine national policy concerning enforcement of arbitration agreements and has done so in more cases than can be cited here.

Accordingly, Brab submits that the proper forum for Hill and for others who now oppose mandatory arbitration as a policy is Congress. Justice David Souter wrote the following in *Keene Corp* v. *United States,* 508 U.S. 200, 217 (1993) (decision affirming the dismissal, for lack of jurisdiction, of a complaint filed in United States Court of Federal Claims):

> We have said nothing until now about [Plaintiff's] several policy arguments, and now can only answer that Keene addresses the wrong forum. It may well be, as Keene argues that [28 U.S.C. sec. 1500 (1988 ed., Supp. IV] operates in some instances to deprive plaintiffs of an opportunity to assert rights that Congress has generally made available to them. . . . But the "proper theater" for such arguments, as we told another disappointed claimant many years ago "is the halls of Congress for that branch of government has limited the jurisdiction of the Court of Claims." *Smoot's Case,* 15 Wall 36, 45 (1873).

The authority of a state or federal court to enforce an arbitration agreement derives from the FAA. The proper branch of government for Hill to seek redress in repealing all or part of the FAA is "the halls of Congress", not this Court.

B. The Issue of "knowing and voluntary waiver" of a judicial forum was never raised or decided in the state courts.

The petition states that this Court's decision in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) did not address the issue of a knowing and voluntary waiver of an employee's right to go to court (Petition, p. 9). Neither has Petitioner until now. While this precise issue was

properly raised and addressed in *Prudential Insurance Co.* v. *Lai,* 42 F. 3d 1299 (12th Cir., 1994), cert. denied 116 S. Ct. 61 (1995), cited in the petition, this petitioner never raised this issue in the Kentucky courts. She has obliquely attempted to smuggle a "knowing and voluntary waiver" issue into this petition (petition, pp. 9-12) but this Court cannot consider it here for the first time. Reaffirming its longstanding practice in *Perry* v. *Thomas,* 482 U.S. 480, 493 (1987), this Court declined to address the question of whether an arbitration agreement constituted an unconscionable, unenforceable contract of adhesion where the issue was not decided by the lower courts.

A federal claim cannot be considered by this Court, under 28 U.S.C. sec. 1257, unless it has been either raised in the state court or considered and resolved by the state court. *McGoldrick* v. *Compagnie Generale,* 309 U.S. 430, 434 (1940); *Hill* v. *California,* 401 U.S. 797, 805 (1971). A litigant must follow state procedures in raising the federal question. *In re Lamkin,* 355 U.S. 59 (1957). When required by state practice, the federal question must be raised before the trial court. *Williams* v. *Georgia,* 349 U.S. 375, 382-83 (1955.) The rule in Kentucky is that the Kentucky appellate courts are without authority to review issues not raised in or decided by the trial court. *Regional Jail Authority* v. *Tackett,* Ky., 770 S.W. 2d 225, 228 (1989); *Transportation Cabinet* v. *Cassity,* Ky 912 S.W. 2d 48, 51 (1995, amended, 1996).

Hill never complained at the trial court level, either by sworn testimony or affidavit, that she did not voluntarily or knowingly waive her right to go to court. Furthermore, she never raised this issue before the Kentucky Court of Appeals or the Kentucky Supreme Court. The Kentucky courts have been afforded no opportunity to consider this issue and it is not properly before this court.

C. This Petition has not presented an unsettled question of Federal law.

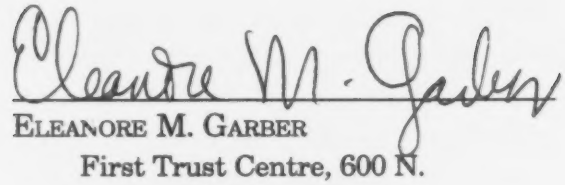
Following *Gilmer,* the Courts have overwhelmingly enforced mandatory arbitration of employment disputes involving statutory civil rights claims and other claims, as petitioner explicitly concedes (petition, p. 5). Petitioner cites no conflict in the courts, either within the federal appeals courts or among the states' highest courts or between the federal and state courts. The Kentucky Court of Appeals decision, upholding the deferral to arbitration of all of the statutory claims against her supervisor and all of her claims against her employer, was in accordance with the holding of *Gilmer* and its many progeny.

Petitioner first sought redress for all of her claims before the Equal Employment Opportunity Commission (EEOC). The sole domain of the Equal Employment Opportunity Commission is claims of discrimination arising in employment. Subsequently, Petitioner filed this action in the Kentucky circuit court. She now submits that **none** of the claims she brought before the EEOC arose out of her employment. Her complaint belies her present posture. The courts have virtually, uniformly upheld mandatory arbitration of the types of claims raised in this action and the petition should be denied.

CONCLUSION

Because this petition has raised nothing for this Court to decide, the petition should be denied.

Respectfully submitted,



ELEANORE M. GARBER
First Trust Centre, 600 N.
200 South Fifth Street
Louisville, KY 40202
(502) 585-5100
Counsel for Respondent,
W. William Brab

Dated: October 14, 1997